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No. 03-701

In The
Supreme Court of the United States

JAMES S. and REBECCA DEATON, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF THE PETITIONERS

Thomas Sayre Llewellyn*
5125 MacArthur Blvd., NW
Suite 32A
Washington, DC 20016
(202) 237-7291

Harry Ng
Ralph J. Colleli Jr.
Erik Milito
American Petroleum Institute
1220 L Street, NW
Washington, DC 20005
(202) 682-8000

Counsel for *Amicus Curiae*
* Counsel of Record

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The American Petroleum Institute ("API") respectfully files this brief *amicus curiae* in support of petitioners James and Rebecca Deaton in Case No. 03-701.[1] The petition seeks review of the judgment of the United States Court of Appeals for the Fourth Circuit that the Army Corps of Engineers ("Corps") had the authority under Section 404(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1344(a), to regulate a roadside ditch abutting petitioners' property in Wicomico County, Maryland, and wetlands located on the petitioners' property. *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003). Neither the roadside ditch nor the wetlands are adjacent to any navigable water body. *Amicus* believes that the Fourth Circuit misconstrued the Act, in light of this Court's decision in *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*").

INTEREST OF THE *AMICUS CURIAE*

API is a non-profit, nationwide trade association representing more than 400 member companies engaged in all aspects of the petroleum and natural gas industry. Among other things, it is API's objective to promote the interests of the petroleum and natural gas industry in all of its branches. API regularly represents the petroleum and natural gas industry in administrative rulemaking

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[1] No counsel for any party has authored this brief in whole or in part. No entities other than API and its members have made monetary contributions to the preparation and submission of this brief. In addition, written consent has been obtained from counsel for all petitioners and the respondent for the filing of this brief pursuant to Supreme Court Rule 37. The letters reflecting consent have been filed with the Clerk's Office.

proceedings in the various state and federal agencies, and in litigation in the state and federal courts.

The petroleum and natural gas industry consists of various types of facilities that are widely dispersed throughout the nation, including tens of thousands of production wells, more than 100 refineries, more than 1,000 terminals, more than 5,000 bulk storage plants, and more than 100,000 service stations. While many of those facilities are located near navigable waters or adjacent wetlands, many others are distant from any navigable waters or adjacent wetlands, but could still be subject to CWA regulation under the Fourth Circuit's decision. API shares the concern of the petitioners that the implementation of the CWA conform to the clear intent of Congress.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit misread this Court's decision in *SWANCC* and thus failed to apply the intent of Congress in enacting the CWA. The Fourth Circuit decision potentially affects the entire system of programs under the CWA, creates a conflict with the Fifth Circuit over the scope of the CWA, and will result in significant, unjustified economic burdens for American industry. For these reasons and the reasons set forth in the petition, the Court should grant the writ.

I. THE FOURTH CIRCUIT FAILED TO FOLLOW *SWANCC*.

A. The Fourth Circuit Allowed CWA Regulation Of Areas That Are Neither Navigable-In-Fact Waters Nor Adjacent To Such Waters.

In *Deaton*, the Fourth Circuit ignored the overriding import of the *SWANCC* decision. In *SWANCC*, this Court struck down the "Migratory Bird Rule" as exceeding the Corps' authority under the CWA. In reaching its decision in *SWANCC*, this Court found that Congress clearly intended to limit the application of the CWA to navigable-in-fact waters or "traditional navigable waters," and wetlands adjacent to such waters. The Fourth Circuit thus erred in finding the CWA "sufficiently ambiguous" to require judicial deference to the Corps' assertion of authority over a roadside drainage ditch and wetland far removed from any traditional navigable waters.

In *SWANCC*, this Court found "§ 404(a) [of the CWA] to be clear." *SWANCC*, 531 U.S. at 172. Section 404(a) authorizes the Corps to regulate discharges of dredged or fill material into "navigable waters," which are defined as "the waters of the United States, including the territorial seas," 33 U.S.C. § 1362(7). What this Court *expressly* said was clear about section 404(a) is that it was not intended to regulate nonnavigable, isolated, intrastate waters, such as the abandoned gravel pit at issue in *SWANCC*.

This Court reached its express conclusion as follows. First, the Court pointed out that in 1974, the Corps originally interpreted the term "navigable waters" to mean "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce," 33 CFR § 209.120(d)(1) (1974). *Id.* at 168. Such waters are often referred to as "navigable-in-fact waters" or "traditional navigable waters." The Court highlighted the Corps' position in 1974 that "it is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor," 33 CFR § 209.260(e)(1) (1974). *Id.*

The Court then said that the respondents "put forward no persuasive evidence that the Corps mistook Congress' intent in 1974." *Id.* In other words, as of the 1972 version of the CWA, "navigable waters" meant traditional navigable waters.

Advocates of an expansive construction of the CWA, including the Corps in *SWANCC*, often point to a statement in the 1972 Conference Report that the conferees "intend that the term 'navigable waters' be given the broadest possible constitutional interpretation," S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972). Yet this Court found, quite to the contrary, that "neither this, nor anything else in the legislative history to which [the Corps] point[s], signifies that Congress intended to

exert anything more than its commerce power over navigation." 531 U.S. at 168 n.3.[2]

Having found the intent of the 1972 Act to be clear, the Court next considered whether Congress took a new direction in the 1977 amendments. *Id.* at 168-71. It found that Congress did not take such a new direction.

The Corps had argued that in the 1977 amendments, Congress had broadly approved new regulations of the Corps that asserted CWA authority over waters and wetlands, without any consideration of navigability. *See id.* at 168-69. The Court found insufficient evidence of any such approval. *Id.* at 170. The Court found that the only aspect of the Corps' 1977 regulations that Congress had approved was the assertion of authority over wetlands *adjacent to traditional navigable waters.*

Wetlands adjacent to traditional navigable waters constitute a special case that the Court had addressed earlier in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). Indeed, in *SWANCC*, the Court was careful to dispel any notion that its earlier ruling in *Riverside Bayview Homes* should be construed to extend federal authority to anything other than wetlands adjacent to

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[2] Unstated in the Court's opinion in *SWANCC* is that before 1972, in implementing the Rivers and Harbors Act, the Corps had adopted a cramped view even of traditional navigable waters, as described in modern federal case law. *See* Albrecht and Nickelsburg, *Could SWANCC Be Right? A New Look At The Legislative History Of The Clean Water Act*, 32 Envtl. L. Rep. 11042, 11044-46 (2002). Thus, in enacting the CWA in 1972, Congress apparently wanted to ensure that the Corps would exercise its full constitutional power *over navigation*. *Id.* at 11048-49.

navigable-in-fact waters, or as the Court put it, "adjacent to bodies of open water." 531 U.S. at 167.

Although in *Riverside Bayview Homes* the Court had suggested that the term "navigable" in the CWA was of "limited import," 474 U.S. at 133, in *SWANCC* the Court emphasized the continued importance of the term "navigable":

> [I]t is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.

531 U.S. at 172. In order to rule for the respondents in *SWANCC*, the Court said that it "would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open bodies of water." *Id.* at 168. However, the Court concluded that "the text of the statute will not allow this." *Id.*

Thus, to reach its express conclusion that section 404(a) was not intended to regulate nonnavigable, isolated, intrastate waters, such as the abandoned gravel pit at issue in *SWANCC*, the Court found that the 1972 Act clearly applied only to traditional navigable waters, and that Congress did not fundamentally change this in the 1977 amendments, although Congress did specifically authorize regulation of wetlands *adjacent to traditional navigable waters* in 1977. In other words, the Court found

clear Congress' intent to limit the scope of the CWA to traditional navigable waters and wetlands adjacent to traditional navigable waters.

Nonetheless, the Fourth Circuit in *Deaton* found the statute to be "ambiguous." *Deaton*, 332 F.3d at 709-11. It said that the Corps' 1974 definition, which was limited to traditional navigable waters, only "captured what *SWANCC* holds to be Congress's *general intent* in enacting the CWA." *Id.* at 711 (emphasis added). Accordingly, the Fourth Circuit deferred to the Corps' assertion of authority over the roadside ditch and the nearby wetland, under the second step of the *Chevron*[3] analysis.

The Fourth Circuit thus erred. It ignored the reasoning of this Court in *SWANCC* that the statute is clear, and that the statute only applies to traditional navigable waters and adjacent wetlands. As a result, it erroneously permitted the Corps to regulate a drainage ditch and a wetland, neither of which is a traditional navigable water or even adjacent to a traditional navigable water.

B. The Fourth Circuit Allowed CWA Regulation Of Areas Lacking Even A "Significant Nexus" To Any Navigable-In-Fact Water.

The Fourth Circuit stated that "[t]he precise question here is whether the Clean Water Act extends to distant, nonnavigable tributaries of navigable waters." 332 F.3d at 709. This is not only the heart of the issue in *this* case, but also in many of the other cases being

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3 *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

decided by the various lower federal courts, which are reaching varying conclusions.

Following *SWANCC*, some courts and commentators have concluded that there must at least be a "significant nexus" between a nonnavigable water body or wetland and a traditional navigable water in order to support CWA jurisdiction. *See, e.g., FD&P Enterprises Inc. v. United States Army Corps of Eng'rs*, 239 F.Supp.2d 509, 516 (D.N.J. 2003). This is based on the Court's explanation in *SWANNC* that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." 531 U.S. at 167.

The Fourth Circuit itself recognized this principle, but then failed to apply it. It literally ignored the word "significant":

> In *Riverside Bayview* the Supreme Court concluded that the Corps regulation extending jurisdiction to adjacent wetlands was a reasonable interpretation in part because of what *SWANCC* described as "the significant nexus between the wetlands and 'navigable waters.'" . . . There is also *a nexus* between a navigable waterway and its nonnavigable tributaries.

332 F.3d at 712 (emphasis added). Elsewhere, the Fourth Circuit characterized *SWANCC* as "suggesting that covered nonnavigable waters are those with *some connection* to navigable ones." *Id.* at 709 (emphasis added). Thus, the Fourth Circuit reduced a "significant" nexus to merely "a" nexus or "some connection."

However, it is clear from *SWANCC* that "a" nexus or "some connection" is not sufficient. At the very least, *SWANCC* established that there must be a "significant nexus" with a navigable-in-fact water in order to confer CWA jurisdiction over a distant, nonnavigable "tributary," such as the drainage ditch in this case.

Nor is this merely a matter of semantics. Although the Fourth Circuit found that there was some evidence that discharges into nonnavigable tributaries *can have* substantial effects on the quality of navigable waters, 332 F.3d at 712, there was no specific evidence of such effects of the ditch or "tributary" at issue in the case, *see* Petition for Writ of Certiorari, *Deaton v. United States*, No. 03 - 701, at 7-8 (November 10, 2003). Surely, some nonnavigable tributaries have a significant nexus with navigable water, but this is a far cry from the conclusion that *any* nonnavigable tributary has such a significant nexus.

When it ultimately upheld the Corps' assertion that its "jurisdiction extends to *any* branch of a tributary system that *eventually flows* into a navigable body of water," 332 F.3d at 711 (emphasis added), the Fourth Circuit clearly found a "significant nexus" to be unnecessary. Thus, it erroneously upheld CWA jurisdiction where essentially "any" connection to navigable waters exists, even one that is extremely tenuous and remote.

This Court should grant the writ to rectify the Fourth Circuit's failure to follow *SWANCC*.

II. THE SCOPE OF THE CLEAN WATER ACT IS AN ISSUE OF GREAT NATIONAL IMPORTANCE.

A. The Fourth Circuit's Decision Will Have Broad Effects On The Implementation Of The Clean Water Act.

The Fourth Circuit's decision is of major significance because the term "navigable waters" governs the scope of several distinct regulatory programs under the CWA, including permitting under the National Pollutant Discharge Elimination System ("NPDES"), 33 U.S.C. § 1342; oil and hazardous substance spill prevention and liability provisions, 33 U.S.C. § 1321; and permitting for the discharge of dredged or fill material such as that at issue in the *Deaton* case, 33 U.S.C. § 1344(a). The term "navigable waters" also governs the scope of the Oil Pollution Act ("OPA"), and at least one circuit court has held that the term has the same meaning under both statutes. *Rice v. Harken Exploration Co.*, 250 F.3d 264, 267 (5th Cir. 2001).

The regulations implementing the CWA contain no less than 10 definitions of "navigable waters" and "waters of the United States." According to the *Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States,"* issued jointly by the Corps and the Environmental Protection Agency ("EPA"), "[c]ounterpart and substantively similar regulatory definitions appear at 40 CFR 110.1, 112.2, 116.3, 117.1, 122.2, 232.2, 300.5, part 300 App. E, 302.3 and 401.11." 68 Fed. Reg. 1991, 1994 (Jan. 15, 2003). Many of these definitions, including the Corps' definition under

section 404 of the CWA, are extremely broad and purport to regulate waters and wetlands with little or no connection to traditional navigable waters. The Fourth Circuit's decision may be taken by the agencies as an implied validation of such expansive regulatory definitions, notwithstanding this Court's ruling in *SWANCC*.

Moreover, the Fourth Circuit's decision has been afforded great deference by other circuits. In *United States v. Rapanos*, the Sixth Circuit found there to be a sufficient nexus between wetlands adjacent to a man-made drain and traditional navigable waters far removed (between eleven and twenty-one miles) from the man-made drain. *Rapanos*, 339 F.3d 447 (6th Cir. 2003). The Sixth Circuit found the Fourth Circuit's decision persuasive and relied upon the analysis of the Fourth Circuit in finding "an ample nexus to establish jurisdiction" under the CWA. *Id.* at 453.

In *United States v. Rueth Development Co.*, the Seventh Circuit affirmed penalties assessed by the EPA against the defendant for failure to obtain a permit before discharging dredged or fill material into wetlands that were adjacent to a ditch, which ultimately led to traditional navigable waters by way of another ditch. *Rueth*, 335 F.3d 598 (7th Cir. 2003). The Seventh Circuit indicated that the connection between nonnavigable waters and traditional navigable waters need only be slight to confer jurisdiction. *Id.* at 604. It relied on *Deaton* in determining that *SWANCC* did not affect the Corps' assertion of jurisdiction: "the Fourth Circuit upheld the Corps' exercise of adjacency jurisdiction over a parcel of land whose only connection to navigable waters was surface runoff that, after a 'winding, thirty-two-mile

path,' emptied into the Chesapeake Bay." *Id.* (quoting *Deaton*, 332 F.3d at 702).

In addition, the Fourth Circuit itself continues to rely on *Deaton* to uphold regulatory jurisdiction where nonnavigable waters are far removed from traditional navigable waters. *See Treacy v. Newdunn Associates, LLP*, 344 F.3d 407 (4th Cir. 2003).

Accordingly, the *Deaton* decision is having, and will continue to have, widespread influence upon the implementation of the CWA.

B. The Conflict Between The Fourth and Fifth Circuits Creates Substantial Confusion And Uncertainty For The Regulated Community.

The Fourth Circuit's decision conflicts with the Fifth Circuit's decision in *Rice v. Harken Exploration Co.* 250 F.3d 264 (5th Cir. 2001).[4] *See* Petition for Writ of Certiorari, *Deaton v. United States*, No. 03 - 701, at 10-14 (November 10, 2003). This conflict creates substantial confusion and uncertainty for the regulated community.

The petroleum and natural gas industry has thousands of facilities operating throughout the nation.

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[4] In fact, the Fifth Circuit recently affirmed that it is in conflict with the Fourth and Sixth Circuits in *United States v. Needham*. No. 02-30217, 2003 WL 22953383, at *3 (5th Cir. 2003). According to the Fifth Circuit, the expansive interpretation of navigable waters by the Fourth and Sixth Circuits is "unsustainable under *SWANCC*" and "the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like." *Id.*

While many of those facilities are located near navigable waters or adjacent wetlands, many others are distant from any navigable waters or adjacent wetlands (although not necessarily without some highly tenuous connection to such waters or wetlands). Some companies have operations in many different states and regions. Corporate planning for compliance with the NPDES, oil spill prevention, and dredge and fill programs has become extremely complicated with the law's divergence among the circuits.

The difficulty is compounded by a lack of clear guidance from the responsible federal agencies. Congress and the President have delegated to the Corps and EPA authority to administer the regulatory programs under the CWA and the OPA. The Corps and EPA have attempted to issue clarifying guidance in light of this Court's decision in *SWANCC*. 68 Fed. Reg. 1991, 1995-1998 (Jan. 15, 2003). This "guidance" acknowledges that the lower courts are split in their interpretations of *SWANCC* and the question of CWA jurisdiction. *Id.* It notes that some courts have taken the same view as the Fourth Circuit, that CWA jurisdiction extends to the entire tributary system, while other courts have taken the view of the Fifth Circuit, that SWANCC interprets CWA jurisdiction less expansively. *Id.* It admits that there are "uncertainties" concerning jurisdiction under the CWA over some isolated, intrastate waters that are not navigable. *Id.* at 1996. It also states that the Corps and the EPA staff should, "generally speaking," assert jurisdiction over tributary systems of navigable waters. *Id.* at 1998. Ultimately, the guidance directs Corps and EPA staff to "make jurisdictional and permitting decisions on a case-by-case basis considering this

guidance, applicable regulations, and any additional relevant court decisions." *Id.*

Thus, not only does the split between the Fourth and Fifth Circuits create confusion by itself, the federal agencies responsible for implementing the CWA are unclear in their interpretations of CWA jurisdiction. Considering that there are ten EPA regions and eight Corps districts, petroleum and natural gas companies throughout the country are now subject to a multiplicity of interpretations of the CWA. The Court should grant the writ in order to eliminate the confusion and uncertainty that currently beset the regulated community.

C. The Fourth Circuit's Decision Poses Significant Economic Consequences For The Regulated Community.

Compliance with the permitting, planning, treatment, and other requirements of the various CWA programs is often very costly. Considering the Fourth Circuit's misreading of *SWANCC* and the resulting expansive interpretation of "navigable waters," any of thousands of facilities could find itself subject to extensive CWA regulation through a federal agency's creatively linking an abutting ditch, dry arroyo, excavation, or other topographic feature through a geographical chain that "eventually" leads to a navigable-in-fact water, regardless of the distance from the navigable-in-fact water or the lack of scientific support that actually demonstrates a potential effect on the navigable-in-fact water. This is especially a problem in the exploration and production segment of the petroleum industry, in which many operations are located in arid, desert or desert-like climates, such as in west Texas or

New Mexico, where the possibility that a remote ditch will affect a navigable-in-fact water can be extremely attenuated.

Thus, the Fourth Circuit's decision poses significant, detrimental economic consequences for industry that are not justified by the purported benefits to be gained.

CONCLUSION

The decision of the Fourth Circuit conflicts with this Court's decision in *SWANCC*, thereby opening the door to substantial overreaching by the Corps and EPA in the implementation of the CWA. Because of this, and because the scope of the CWA is an issue of great national importance, the Court should grant the writ.

January 30, 2004

Respectfully submitted,

Thomas Sayre Llewellyn*
5125 MacArthur Blvd., NW
Suite 32A
Washington, DC 20016
(202) 237-7291

Harry Ng
Ralph J. Colleli Jr.
Erik Milito
American Petroleum Institute
1220 L Street, NW
Washington, DC 20005
(202) 682-8000

Counsel for *Amicus Curiae*
(Counsel of Record*)